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No. _____ OFFICE OF THE CLERK

In the
Supreme Court of the United States

VALENTINA PEREZ,
Petitioner,

v.

NORWEGIAN-AMERICAN HOSPITAL, IVAN RIVERA, and STEVE DAHL,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Valentina Perez
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Pro Se

QUESTIONS PRESENTED

1. Whether a single act of battery succeeded by repeated acts of public humiliation, threats, intimidation, demotion, and isolation constitute the perpetuation of a hostile workplace permeated with discriminatory intimidation, ridicule, and insult within the meaning set forth in *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 114 S.Ct. 367 (1993).

2. Whether an adverse employment decision resulting in a demotion may be deemed causally linked to the reporting of sexually motivated battery that occurred six months prior to the demotion where the employer has committed several discrete and overt acts of discriminatory conduct toward the victim during the interim.

LIST OF PARTIES

All parties to this suit have been included in the caption above.

RULE 29.6 NOTATION

Pursuant to Supreme Court Rule 29.6, petitioner states that she is not a corporation, has no parent company, and no wholly or nonwholly owned subsidiaries

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1), is unreported. The opinion of the district court (App. A, *infra* 2), is unreported.

JURISDICTION

The court of appeals' judgment was entered on March 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States ...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI cl. 2. The relevant statutory provision is 42 U.S.C. § 2000e-5.

STATEMENT OF THE CASE

This case raises the very serious question of the lack of uniformity of the enforcement of the Title VII prohibition against discrimination and harassment based on gender. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343, 1347, and 42 U.S.C. § 2000e-5. This Court established a standard for evaluating the severity and pervasiveness of discriminatory conduct in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993). The standard set forth in *Harris*, provides for evaluation of the

existence of a hostile work environment on a case-by-case basis. *Harris* holds that the language of Title VII:

> evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with discriminatory intimidation, ridicule, and insult...that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, ...Title VII is violated."

Harris, 510 U.S. at 21. The court established that the existence of a hostile work environment may be determined by "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 21. Unfortunately, the standard has opened the door for loose interpretation, inequitable dispositions, and inconsistent rulings by district courts. In the Seventh Circuit, the Court of Appeals has ruled that statement and acts of "teasing", sexually suggestive comments, intimidating staring, and unwanted touching are insufficient to constitute severe and pervasive conduct while citing *Harris* as authority for this finding. *Adusumilli v. City of Chicago,* 164 F.3d 353, 362 (7th Cir. 1998). In view of the Court instituted determinants, the facts alleged in cases dismissed and disposed of upon summary judgment in the Seventh Circuit are incongruous with this Court's holding in *Harris.*

A. The Need to Establish Uniformity In the Application of the *Harris* Standard to Determine "Severe and Pervasive" Conduct.

Victims of sexual harassment and sex discrimination within the jurisdiction of the Seventh Circuit cannot rely on the protections of Title VII or the precepts established in *Harris*. Due to the conflicting manner in which district courts have applied the *Harris* factors, facts clearly supporting claims of severe and pervasive discriminatory conduct constituting hostile work environments are routinely disregarded and meritorious claims have been denied.

Both the *Adusmilli* and *Hilt-Dyson* courts made findings ostensibly applying the *Harris* principles. Neither of these rulings provided a solid basis to ascertain what depth of conduct is prohibited and what level of conduct is acceptable. In both cases, the court supplanted the objective and subjective effect on the respective plaintiffs and inextricably determined that the offenses could not have been as bad as claimed. Each court summarily came to its conclusion based on its subjective determination that the plaintiff did not suffer "great" impact as a result of the employer's conduct. *Adusumilli*, 164 F.3d at 361. The inconsistent findings issued by the courts are not supported by the facts in each case. Based upon the lack of uniformity of the application of *Harris*, the Seventh Circuit's rulings regarding the determination of hostile work environments are unjustly skewed.

B. The Seventh Circuit's Imposition of an Artificial Barrier to Recovery Premised on its Random Assignment of an Unduly Limited Temporal Proximity Requirement.

The lower court's ruling impairs the ability of a plaintiff to sustain a viable retaliation claim. Its reasoning is in opposition to the decisions of the Ninth Circuit Court of Appeals. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511 (2001). The Seventh Circuit gives no clear definition of when alleged acts of discrimination are

within temporal proximity of a protected activity. If the court's ruling is allowed to stand, it will effectively bar legitimate claims of retaliation. Review of this case is warranted in order to set a clear threshold in establishing a causal link between a protected activity and adverse employment action.

C. The Court of Appeal's Decision

The court below concluded that a slap on the buttocks is not objectively abusive. (App. A, *infra,* at p. 6). The court likened the unequivocal, forceful blow suffered by the Petitioner to the tentatively identified "poke" noted by the plaintiff in *Adusumilli*. The lower court further, found that the stalking by one of the defendants and taunts by Petitioner's coworkers were not related to her sex although there was no evidence refuting her assertions of her malefactors' stated intent. (App. A, *infra,* at p. 7). The court of appeals found that Petitioner's transfer to an unfavorable shift, subjection to the authority of her subordinates, and suffering of post traumatic stress syndrome did not constitute adverse employment actions. Finally, the court found that due to the six month interval between Petitioner's complaint of Defendants' battery of her and her ultimate transfer to the nightshift, the time was "too lengthy" to establish a causal connection. (App. A, *infra,* at p. 9).

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Has Systematically Misapplied the Standard Set forth in *Harris* and Guidance from This Court is Needed to Reconcile the Definition of Harassment as Applied in *Adusumilli, Hilt-Dyson, Quantock, Hostetler*, and *Smith*.

The Seventh Circuit Court of Appeals acknowledged in *Hilt-Dyson* that no "bright line" exists differentiating

"innocuous from actionable behavior". *Hilt-Dyson v. City of Chicago,* 282 F.3d 456, 463 (7th Cir. 2002); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807 (7th Cir. 1997). In spite of the factors delineated by this Court, the district courts and the Seventh Circuit Court of Appeals has failed to render decisions in a consistent manner. This has resulted in discriminate and inconsistent rulings for different victims who have experienced substantially similar circumstances. Due to the lower courts' failure to establish a uniform basis upon which discrimination and harassment victims can rely, claimants are subject to a veritable crap-shoot when any given defendant submits a motion for summary judgment. In light of the courts' random and arbitrary method of applying the *Harris* factors, the courts need guidance to set forth more objective elements defining "severe and pervasive" conduct.

Adusumilli v. City of Chicago

The *Adusumilli* court examined evidence of offensive statements and touching and deemed them to be within the "safe harbor" of tepid, intermittent, and equivocal behavior. The court summarily came to this conclusion based on its subjective determination that the plaintiff in that case did not suffer "great" impact as a result of the employer's conduct. *Adusumilli*, 164 F.3d at 361.

Hilt-Dyson v. City of Chicago

In *Hilt-Dyson,* the court found that offensive touching and leering, to such an extent that the victim felt intimidated, did not constitute harassment within the meaning of Title VII. The *Hilt-Dyson* court has created a requirement that in order for an unwanted sexual touching to be objectively hostile or abusive, a "threat" or "intimidation" must accompany the conduct. The very nature of the touching itself begs the question of whether such contact would be threatening or intimidating to the recipient. Further, the court created a

factor not included in *Harris* in that if the malefactor ceases the offending conduct after having already committed the offending act, the egregious nature of the conduct is negated.

Quantock v. Shared Marketing Services, Inc.

Contrarily in *Quantock*, the Seventh Circuit held that the "outright solicitation of numerous sex acts" constitutes severe conduct, even though committed infrequently. *Quantock*, 312 F.3d at 904. The court found that the actor's "significant position of authority" was a deciding factor as to whether sexually explicit suggestions were objectively severe. The court further found that the plaintiff's reporting of the incident, receipt of psychological treatment, and feelings of humiliation can substantiate the severity of the defendant's conduct and the hostile nature of her work environment. *Quantock*, 312 F.3d at 904.

Hostetler v. Quality Dining, Inc.

The court found that the defendant's act of placing his tongue in the plaintiff's mouth and partially removing her bra constitutes humiliating and "possibly threatening" conduct. The court further found that the defendant's reference to a "hypothetical sexual act" with the plaintiff "could be interpreted as an (uninvited) sexual proposition."

Smith v. Sheahan

In *Smith* the court found that the plaintiff's violent physical abuse at the hand of her coworker constituted sexual harassment, rather than criminal battery, even though the contact was not sexual in and of itself. The Seventh Circuit found that the defendant's alleged propensity to target women, asserted via the affidavits of his other alleged victims, was sufficient to show his discriminatory intent. *Smith v. Sheahan*, 189 F.3d 529, 531 (7th Cir. 1999).

The court below, through its ruling in the instant case, has further diluted the demarcation line between the actionable and the permissible by creating additional proof requirements. Moreover, the lower court has unreasonably and unnecessarily declined to rule on the relationship to the *Harris* elements of the cumulative acts of battery, taunting, stalking, demotion, and disparate treatment resulting in severe psychological repercussions as they relate to a determination of severe and pervasive conduct. A ruling from this Court is necessary to solidify the types of acts that may be deemed actionable under *Harris* and the implications of cumulative offensive acts to the requisite factors imposed by this Court.

II. The Decision Below Perpetuates and Validates the District Courts' Misapplication of *Harris* and its Progeny to Suit the Personal Biases of Individual Judges Rather than the Carriage of Justice.

A. The Court Below Erred in Finding that Battery Consisting of Slapping and Conduct including "shunning" was not "severe and pervasive"

Although in *Quantock,* the court found the plaintiff's malefactor's position of authority sufficiently daunting so as to render his infrequent conduct "severe", the court of appeals in this case deemed insignificant one of Petitioner's malefactors close familial relationship and position of influence with a decision-maker with the authority to terminate her. The court further disregarded another malefactor's admission that the motive for his mistreatment of her was her complaint against the hospital administrator's son. The lower court omitted ruling on the implication of Petitioner's subjection to the authority of her subordinates and suffering of post-traumatic stress syndrome as they relate

to the determination as to the severity of the Defendants' actions and the permeation of a hostile work environment.

Further, the lower court declined to analyze the implication of the multiple adverse acts of Defendants as they relate to the factors established by this Court. The court must "look to "all the circumstances", including the frequency of discriminatory conduct and whether it is physically threatening or humiliating, in addition to whether or not it unreasonably interferes with an employee's work performance." *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 116, 122 S.Ct. 2061, 2074 (2002). The cumulative effect of repeated conduct, a series of separate acts collectively constituting one act, evinces a hostile work environment. *National,* 536 U.S. at 117 (2002).

B. The Court Below Erred in Finding that the Employer's Conduct in Transferring Petitioner to a Less Favorable Shift, Repeatedly Charging Her With False Disciplinary Actions, and Compelling Her to Report to the Authority of Her Subordinates Occurred Too Long After Her Internal Complaint of Sexual Harassment to be Deemed Retaliatory

The Seventh Circuit Court's decision is contrary to this Court's ruling in *Clark County Sch. Dist. v. Breeden,* that a causal relationship between the protected activity and the adverse employment action suffered need not be proved by temporal proximity. *Clark,* 532 U.S. at 273. The Seventh Circuit has used the temporal proximity as a bar to allowing legitimate retaliation claims to proceed on the merits.

Under the direct method, in order to present a prima facie case of retaliation, a plaintiff must show: (1) that she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal relationship between the protected activity and the adverse employment

action suffered. *Ajayi v. Aramark Business Services Inc.*, 336 F. 3d 520, 533 (7th Cir. 2003).

The court below erred in concluding that Petitioner failed to establish a prima facie case of retaliation. (App. A, *infra*, at p. 9-10). The court's decision is based on the flawed premise that Petitioner needed to establish temporal proximity between her complaint of discrimination and Defendants' retaliatory acts. There is no dispute that Petitioner engaged in a protected activity when she made a formal complaint against Defendant Dahl. The Seventh Circuit effectively impeded Petitioner's claim in its finding that the six month lapse from the time she complained of Defendant Dahl and her subjection to a false reprimand and demotion was too lengthy to establish a causal connection. (App. A. *infra* at p. 9).

This Court has determined that "the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be *very close*." *Clark,* 532 U.S. at 273 (emphasis added). This Court has not, however, given the circuits any guidance on what constitutes *close proximity*. In *Clark,* this Court noted that an action taken 20 months later is insufficient to establish causality. *Clark,* 532 U.S. at 274.

The Seventh Circuit has held that "to establish a causal connection via mere temporal proximity, the employer's adverse action must follow fairly soon after the employee's protected conduct." *Hoffman-Dombrowski v. Arlington Intern. Racecourse,* 254 F.3d 644, 653 –54 (7th Cir. 2001) (finding that employee's termination 13 months later was not causally connected to her retaliation claim); citing *Fyfe v. City of Fort Wayne,* 241 F.3d 597, 603 (7th Cir. 2001). In the case at bar, the Seventh Circuit appellate court

determined that a six month lapse between the protected activity and the reprimand and transfer was too long to establish a causal connection. (App. A, *infra,* at p. 9). The court's reliance on *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773 (7th Cir. 2002) is misapplied.

In *Franzoni,* the Seventh Circuit found that adverse employment action that occurred six months after the protected expression is too lengthy to sustain a retaliation claim in the absence additional evidence. *Franzoni*, 300 F.3d at 772-773. The lower court's conclusion that Petitioner's claim must fail because she cannot show temporal proximity is flawed. Petitioner, unlike the employee in *Franzoni,* presented additional evidence to substantiate her claim of retaliation. *Franzoni*, 300 F.3d at 772-773. Petitioner did not rest her claim solely on the temporal proximity of the defendant retaliatory actions and her sexual harassment complaint.

"Temporal proximity is only evidence of causation not a separate element of the prima facie case." *Haywood v. Lucent Technologies, Inc.* 323 F.3d 524, 533 (7th Cir. 2003). The lower court's analysis in determining a causal link between Petitioner's complaint and her demotion is too narrowly defined. Evidence of temporal proximity coupled with additional evidence, where the proximity is not unduly suggestive, will effectively establish a prima facie case of retaliation. *Farrell v. Planters Lifesavers Co.,* 206 F.3d 271, 280 (3rd Dist. 2000). The lower court's decision improperly limits meritorious claims.

In the Ninth Circuit, the appellate court found that a causal connection can be inferred by producing evidence of the temporal proximity of the adverse action to the statutorily protected activity." *Barnett v. U.S. Air, Inc.,* 157 F.3d 744, 747, 754 (9th Cir. 1998). In *Barnett,* the court found a causal connection between the employee's request for

accommodations and the employer's placement of the employee on the job injury list five months later. *Id.* Likewise, even under the lower court's finding, six months is not too lengthy a period to establish a causal link.

The retaliation against Petitioner did not begin with her demotion, but with (1) Defendant Rivera's and Petitioner's subordinates and co-workers shunning her, isolating her, and taunting her with rumors that she would be demoted; (2) Defendant Dahl repeatedly following her into areas he was not stationed to work, for the express purpose of frightening her; (3) Defendant Rivera drafting allegations of policy violations against her which he knew to be false; and (4) Defendant Rivera's demoting her six month subsequent to her internal complaint. *Passantino v. Johnson & Johnson Consumer Products,* 212 F.3d 493, 502, 507 (9th Cir. 2000) (holding that removing employee's job responsibilities; transferring her accounts to other employees without notice; excluding her from manager's meetings; reducing her performance objectives; changing her job title; and taking other actions to demean her job participation are sufficient acts to establish retaliation.) Workplace conduct is not measured in isolation, but must be evaluated by looking at the totality of the circumstances. *Clark,* 532 U.S. at 271, citing, *Faragher v. Boca Raton,* 542 U.S. 77, 787-88, 118 S.Ct. 2275, 2283 (1998).

The Court's failure to indicate the prohibition or permissibility of committing multiple adverse acts over an extended period of time and failure to rule on the implication of repeated discriminatory acts following an initial harassing act and complaint thereof has resulted in confusion of the prevailing law in the Seventh Circuit and represents a misrepresentation of this Court's holding in *Harris.* Further, the Seventh Circuit has created a factor that replaces causality with temporal proximity as a necessary element of a retaliation claim. *Farrell,* 206 F.3d at 281. If left to stand,

the lower court's ruling will serve to unduly complicate the application of the *Harris* factors to future cases. Finally, the lower court's ruling distorts the *Harris* holding, adds an additional and unduly oppressive element to retaliation claims, and will result in the denial of countless meritorious claims that should properly be presented to a trier of fact for disposition.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: June 3, 2004

Respectfully
Submitted,

/s/ Valentina Perez
Valentina Perez, Petitioner

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APPENDIX

Page

A. Opinion of the U.S. Court of Appeals for the Seventh Circuit.....1

B. Opinion of the U.S. District Court for the Northern District of Illinois, Eastern Division.....1

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 13, 2003
Decided March 5, 2004

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 03-1619

VALENTINA PEREZ,
Plaintiff-Appellant,
v.

NORWEGIAN-AMERICAN HOSPITAL, INCORPORATED, IVAN RIVERA and STEVE DAHL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 00 C 6672

Charles R. Norgle, Sr., *Judge.*

ORDER

Valentina Perez claims that a co-worker, Steve Dahl, sexually harassed her by slapping her buttocks with a notebook he was carrying. After she reported the incident, she claims that she was ostracized at work, passed over for a promotion, paid less than a male co-worker and eventually forced to quit. She sued her employer, Norwegian-American Hospital, for sex discrimination and retaliation. She also alleged a state law claim of battery against Dahl, and a state

law claim of emotional distress against Dahl, the hospital, and her most recent supervisor, Ivan Rivera. The district court concluded that Ms. Perez could not establish discrimination or retaliation and granted summary judgment to the defendants. We affirm.

I

INTRODUCTION

Ms. Perez began working at Norwegian-American Hospital in 1989, first as a security officer and later as a shift supervisor. Ms. Perez contends that, in January 2000, Dahl, a fellow supervisor, slapped her buttocks with a notebook as she exited an elevator. Ms. Perez complained to Joseph Byrnes, her superior at the time, that Dahl had sexually harassed her. Byrnes was near the elevator when the incident occurred, but denied seeing it. Ms. Perez also reported the incident to the hospital's human resources department. Although Ms. Perez complains that the hospital ignored her report, she admitted during her deposition that human resources director Russ Dickow met with both her and Byrnes to discuss Dahl's behavior. The hospital warned Dahl to avoid any future contact with Ms. Perez.

Ms. Perez alleged in her complaint that, after she reported Dahl's behavior, she was subjected to retaliation. It started, she alleged, when co-workers immediately "shunned her and isolated her and perpetuated rumors that she would be demoted." R.90 at 2. She also alleged that Dahl "followed her and watched her while simultaneously writing in a notebook." R.89 at 23, response 204.

Ms. Perez alleged that the retaliation continued six months later when she was denied a request for "comp" time after a male co-worker's request was granted. According to Ms. Perez, the hospital gave supervisory employees "comp"

time, or paid time off, in exchange for any overtime they had worked. She contends that the hospital granted a request for "comp" time made by Ben Espiritu, a fellow shift supervisor, but denied her repeated requests. The hospital, on the other hand, denies that supervisory employees are eligible for "comp" time, and asserts that Espiritu was granted "comp" time only because of a mistake by a new manager who did not know that supervisory employees were ineligible.

Next, Ms. Perez alleged that she was retaliated against when she was passed over for a promotion that went instead to Rivera. She claims that she was more qualified for the promotion than Rivera because, even though they began their employment at the hospital at about the same time, Ms. Perez had ten months' prior experience as a security officer when she was hired while Rivera had none. She also claims that she was more qualified because, through the years, she "received superior training, certifications, evaluations, and commendations for outstanding performance" and because she was an "exemplary officer and leader." Perez Br. at 4. Ms. Perez asserts that, despite her superior qualifications, the hospital promoted Rivera without even posting the opening. The hospital disputes that it failed to post the opening and offered evidence from employees, including Rivera, who said they had seen the posting. R.39, Tab 8 at ¶¶ 35-36; R.46-4 at 81; R.73, Tab 5 at 64. The hospital claims that it did not promote Ms. Perez because she failed to apply for the opening and because Rivera was more qualified, noting that Rivera had more supervisory experience because he was promoted to shift supervisor two years before Ms. Perez.

On July 25, 2000, six months after reporting Dahl's conduct to the hospital, Ms. Perez filed a charge of discrimination and retaliation with the EEOC. Two days later, she contends that Rivera--now her supervisor--harassed and retaliated against her by placing a false disciplinary report in her file accusing her of excessive tardiness, not

responding to her pager during an emergency and driving a hospital vehicle at night with its headlights turned off. R.91-2, Tab 12. As a result of the disciplinary write-up, Ms. Perez claims that Rivera transferred her to the less desirable overnight shift. The transfer prompted Ms. Perez to file a second EEOC charge alleging that she was transferred in retaliation for filing the earlier charge.

Ms. Perez alleged that, as a result of the continued harassment, she lost sleep, suffered anxiety attacks and felt humiliated. She sought medical attention and went on sick leave September 19, 2000. She never returned to work and eventually tendered a short resignation letter two months later; the letter did not give a reason for her resignation. R.39, Tab 4. In January 2001, Ms. Perez filed a third EEOC charge recounting her earlier allegations and adding that she had been constructively discharged.

After receiving a right-to-sue letter from the EEOC, Ms. Perez filed suit. In addition to alleging discrimination[1], retaliation, battery and emotional distress, Ms. Perez alleged that the hospital denied her equal pay because it awarded "comp" time only to similarly situated male employees.

The court granted summary judgment to the defendants on all of Ms. Perez's claims. The court concluded that Ms. Perez's evidence that she was slapped and shunned did not establish discrimination because the conduct was not "severe or pervasive," and therefore did not create a hostile work environment. *Perez v. Norwegian-Am. Hosp.*, No. 00 C 6672, slip op. at 8-11 (N.D. Ill. Feb. 6, 2003). The court also concluded that Ms. Perez could not establish retaliation because 1) her coworkers' conduct (shunning and gossiping about her) was not severe, and 2) the other incidents of which she complains (the decision to promote Rivera over her and to transfer her to a different shift, and the false disciplinary reports that Rivera allegedly placed in her file) happened

long after she reported Dahl's conduct to the hospital and before the hospital found out about her EEOC charge. *Id.* at 15-20. As for Ms. Perez's equal pay claim, the court granted summary judgment because she failed to develop any argument in support of the claim. Because she could not establish any of her federal law claims, the court declined to exercise supplemental jurisdiction over Ms. Perez's state law claims.

II

ANALYSIS

A. Sexual Harassment

Ms. Perez first argues that the district court erred in concluding that evidence about receiving a slap on the buttocks and being ostracized by co-workers was not sufficiently severe or pervasive to survive

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[1] Ms. Perez alleged sex discrimination under 42 U.S.C. § 1981, but because only race discrimination claims may be brought under that statute, the district court construed Ms. Perez's claim as one brought under Title VII. *See Friedel v. City of Madison,* 832 F.2d 965, 966-67 n.1 (7th Cir. 1987).

summary judgment. In order to establish discrimination in the form of sexual harassment, Ms. Perez needed to show that she was subjected to the harassment because of her sex, and that the harassment was so "'severe or pervasive as to alter the conditions of [her] employment and create an abusive working environment,'" measured not only subjectively but also objectively. *Hilt-Dyson v. City of Chicago,* 282 F.3d 456, 462-63 (7th Cir.) (internal citation omitted), *cert denied,* 537 U.S. 820 (2002). In short, she had to show that her work

environment was "hellish." *Rogers v. City of Chicago,* 320 F.3d 748, 752 (7th Gir. 2003).

Ms. Perez contends that the single slap to her buttocks was sufficiently severe to constitute harassment. The district court likened the slap to an "expression of camaraderie . . . not unlike that observed on national television between athletes, with no intended or perceived sexual connotation." *Perez,* No. 00 C 6672, slip op at 10. We disagree with the court's suggestion that the slap on the behind with a notebook is somehow comparable to the gesture of athletes in encouraging each other. We also note our disagreement with the court's suggestion that the slap could not have been sexually-based conduct. Nevertheless, Ms. Perez has not shown that the slap constituted sexual harassment because it was not objectively abusive. The contact Ms. Perez has alleged is not unlike the contact at issue in *Adusumilli v. City of Chicago,* 164 F.3d 353, 362 (7th Cir. 1998), where we affirmed summary judgment entered against a plaintiff who alleged that a co-worker "poked her buttocks" on one occasion.[2] Ms. Perez attempts to distinguish *Adusumilli* by claiming that her situation was more egregious because she saw Dahl slap her, unlike the plaintiff in *Adusumilli who* "did not actual [sic] see her co- worker make contact with her.

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[2] We disagree with the defendants' attempt at oral argument to compare the slap Ms. Perez alleged to the uniform inspection in *Hilt-Dyson.* The supervisor in *Hilt--Dyson* had a legitimate reason for requiring the plaintiff to raise her arms while he inspected her police uniform, even though the plaintiff found the inspection uncomfortable. *Hilt-Dyson,* 282 F.3d at 464. To the contrary, in this case we can discern no legitimate purpose behind Dahl's slapping Ms. Perez on the buttocks.

"Perez Reply Br. at 5. *See Adusumilli,* 164 F.3d at 357. This distinction does not establish, however, that Ms. Perez's workplace was "hellish." Moreover, the fact that the plaintiff in *Adusumilli* did not see her co-worker slap her is not the reason that the contact in that case was deemed inoffensive.

Ms. Perez also contends that she was harassed when co-workers gossiped about her and when Dahl watched her and took notes. Ms. Perez never asserts, however, that she was the subject of gossip because of her sex, *see Pasqua v. Metro. Life Ins. Co.,* 101 F.3d 514, 517 (7th Cir. 1996) (noting that people spread rumors "for any number of reasons having nothing to do with gender discrimination"), or that Dahl looked at her in an improperly sexual way such as "leering," *see Hilt-Dyson,* 282 F.3d at 464 (supervisor does ot have "license to leer" at subordinate's chest). Therefore, the district court properly granted summary judgment to the hospital on Ms. Perez's sexual harassment claim.

B. Failure To Promote

Ms. Perez also argues that the district court incorrectly assessed her qualifications for a promotion to lieutenant in granting summary judgment to the hospital on her failure-to-promote claim. Ms. Perez attempted to establish a *prima facie* case that the hospital failed to promote her in violation of Title VII by showing that 1) she belonged to a protected group; 2) she applied for and was qualified for a promotion; 3) she was rejected for the promotion; and 4) the person promoted had similar or fewer qualifications for the job. *Grayson v. City of Chicago,* 317 F.3d 745, 748 (7th Cir. 2003). In support, Ms. Perez offered evidence that she had worked for the hospital as long as Rivera, the individual who was promoted. She also noted that she had attended more classes to study security-related issues and therefore earned more certifications than Rivera had.

The district court concluded that Ms. Perez could not establish a *prima facie* case for two reasons. First, the court observed, Ms. Perez never applied for the job. This fact appears to be disputed, however. Ms. Perez contends that she requested the promotion orally rather than applying in writing because the hospital never posted the vacancy; she adds that Rivera received the promotion without applying for it at all. The hospital, however, counters that it posted the vacancy, that other employees saw it and that it hired the only person who applied, Rivera. It also argues that Rivera was more qualified than Ms. Perez because he had worked at the hospital one month longer than Ms. Perez and had two years' more experience as a supervisor than she had.

Even if the court erred by accepting as undisputed the hospital's assertion that Ms. Perez never applied for the promotion, it correctly concluded that Ms. Perez failed to show that she was more qualified for the job. It is undisputed that Rivera worked at the hospital one month longer than Ms. Perez and that he had been promoted to shift supervisor two years earlier than she had been. Ms. Perez nevertheless submits that she was more qualified because, unlike Rivera, she had previous experience as a security guard and had earned more security-related certifications than Rivera. Ms. Perez supports her assertions with only her own self-serving statements that her certifications rendered her better qualified; such self-serving statements are insufficient to defeat summary judgment. *Hall v. Bodine Elec. Co.*, 276 F.3d 345,354 (7th Cir. 2002) (plaintiff could not establish sex discrimination solely through "conclusory allegations and self-serving affidavits"). We therefore agree with the district court that Ms. Perez failed to establish that she was as qualified as Rivera for the promotion.

C. Retaliation

Next, Ms. Perez argues that the court failed to recognize the connection between her reports of sexual harassment and the hostility she claims she endured in retaliation. Ms. Perez asserts that she established retaliation under the direct method, which requires a plaintiff to show that 1) she engaged in a protected activity; 2) she suffered an adverse employment action; and 3) the two were causally linked. *See Sitar v. Indiana Dep't of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003) (distinguishing between direct method of establishing retaliation and the indirect method set forth in *Stone V. City of Indianapolis Public Utilities Division,* 281 F.3d 640, 644 (7th Cir.), *cert. denied,* 537 U.S. 879 (2002)).

Ms. Perez contends that she established that co-workers began to shun her and gossip about her being demoted in retaliation for reporting to the hospital in January 2000 that Dahl slapped her. But she has failed to establish that she suffered an adverse employment action because she did not show that the treatment she received from her co-workers in any way "altered the terms or conditions of [her] employment." *See Twisdale v. Snow,* 325 F.3d 950, 953 (7th Cir.), *cert denied,* 124 S.Ct. 957 (2003); *Smart v. Ball State Univ.*, 89 F.3d 437,441 (7th Cir. 1996) (the perceptions of others are not terms or conditions of employment, and therefore cannot be adverse employment actions). She has also failed to establish a causal connection between reporting Dahl in January and being reprimanded by Rivera and transferred to the overnight shift in July. The reprimands and transfer occurred six months after Ms. Perez reported Dahl's conduct, too lengthy a time lapse to establish a causal connection under the direct method. *See Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773 (7th Cir. 2002).

Next, Ms. Perez contends that she established that the July reprimands and transfer were connected to a second

protected activity-her filing of a charge of discrimination with the EEOC just two days earlier. But she offered no evidence that Rivera knew about the charge when he transferred her, and even admits that the hospital did not receive a copy of her EEOC charge until August 9. R.89 at 8, response 69. Ms. Perez claims that, after the hospital received her EEOC charge, Rivera falsely accused her of failing to run a security check and of arriving to work late one day. But she has admitted that the accusations were true, R.91-1, Tab 5 at 655; R.89 at 9, responses 74 & 75, which undermines any inference that the accusations were retaliatory. *See Wallscetti v. Fox,* 258 F.3d 662, 668-69 (7th Cir. 2001). Furthermore, Ms. Perez has not alleged that they were accompanied by any "tangible job consequence," and therefore cannot establish any adverse employment action. *Grube V. Lau Indus., Inc.,* 257 F.3d 723, 729 (7th Cir. 2001).

Finally, Ms. Perez argues that she established that she was constructively discharged for filing charges with the EEOC. In order to establish constructive discharge, Ms. Perez must show that her working conditions were unbearable. *EEOC v. Univ. of Chicago Hosps.,* 276 F.3d 326, 331-32 (7th Cir. 2002). However, as we have discussed earlier, Ms. Perez failed to show that being shunned, reprimanded and demoted resulted in a hostile work environment, let alone an unbearable one. *See, e.g., id.* at 331-32 ("we require the plaintiff to demonstrate a discriminatory work environment 'even more egregious than the high standard for hostile work environment'") (internal citation omitted); *Simpson V. Borg-Warner Auto., Inc.,* 196 F.3d 873,877-78 (7th Cir.1999) death threats create an intolerable work environment; false reprimands and assignment to a fallow sales territory are merely unpleasant, not intolerable).

D. Equal Pay

Ms. Perez argues generally that the district court erred when it granted summary judgment on her claim under the Equal Pay Act, 29 U.S.C. § 201 *et seq.*, because she offered evidence that the hospital gave "comp" time to a male employee but not to her. The district court concluded that Ms. Perez could not pursue an equal pay claim because she did not allege one under the Equal Pay Act in her complaint. Opinion & Order at 6 n.6 (attached as Appendix A to Perez's brief). However, notice pleading does not require a plaintiff to plead legal theories. Therefore, the district court erred by granting summary judgment on this basis. *See Shah v. Inter-Cont'l Hotel Chicago Operating Corp.*, 314 F.3d 278, 282 (7th Cir. 2002).

In order to survive summary judgment on her equal pay claim, Ms. Perez needed to establish a *prima facie* case with evidence that 1) she was compensated differently than a male employee; 2) she and the male employee performed equal work requiring equal skill, effort and responsibility; and 3) they had similar working conditions. *See Cullen v. Indiana Univ. Bd. Of Trs.*, 338 F.3d 693, 698 (7th Cir. 2003); *Wolf v. N. W. Indiana Symphony Soc'y*, 250 F.3d 1136, 1144-45 (7th Cir. 2001). To show that she was compensated differently than a male employee, Ms. Perez offered deposition testimony from fellow shift supervisor Benjamin Espiritu, who testified that the hospital gave "comp" time to shift supervisors in lieu of overtime pay, and that he had received it "[a] few" times in the past. R.91-2, Ex.7 at 64-65. In addition, Ms. Perez offered her own deposition testimony to establish that the hospital repeatedly approved male shift supervisors' requests for "comp" time, but denied her request. R.91-1, EX.5 at 60, 529-30. Ms. Perez also relied upon the Employee Handbook to support her argument that shift supervisors were eligible for "comp" time, although curiously

the excerpts she cited make no mention of "comp time." R.91-2, Ex.20 at 8-9.

The hospital disputes that it wrongly denied "comp" time to Ms. Perez by offering deposition testimony from the human resources director that shift supervisors are ineligible for "comp" time, and with time records showing that no shift supervisor other than Espiritu received it. R.39, Ex.8 at ¶ 9; R.39, Ex.11. As for the "comp" time Espiritu received, the hospital offered time records to show that it was an isolated incident that happened once in December 1999. R.39, Ex.8 at ¶ 9, R.39, Ex.10.

Although the hospital maintains that shift supervisors are ineligible for "comp" time, Ms. Perez created a disputed question of fact about the issue with evidence that at least one, and maybe more, male employees received "comp" time hut she did not. Nevertheless, Ms. Perez has failed to establish the remaining elements of a *prima facie* case with evidence that any male employee who received "comp" time was similarly situated to her. The only evidence Ms. Perez offered to support her contention that she was similarly situated to Espiritu was Espiritu's deposition testimony that they share the same job title. R.91-2, Ex.7 at 20. Ms. Perez asserts, in conclusory fashion, that they were similarly situated; she offered no evidence of whether their jobs shared a "common core" of tasks, what work Espiritu performed, under what conditions, how his responsibilities and skills compared to hers or when Espiritu performed the work for which he received "comp" time. *Cullen,* 338 F.3d at 698. Faced with this lack of evidence, Ms. Perez cannot establish a *prima facie* case under the Equal Pay Act.

E. State Law Tort Claims

Finally, Ms. Perez argues that the district court should have exercised supplemental jurisdiction under 28 D.S.C. §

1367 over her state law claims against defendants Dahl and Rivera. But once the court granted summary judgment on all of Ms. Perez's federal claims, it was free to decline to exercise jurisdiction over her state law claims. *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 896 (7th Cir. 2001).

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VALENTINA PEREZ, Plaintiff,	)	
v.	)	Case No.: 00C6672
NORWEGIAN-AMERICAN HOSPITAL, Norgle IVAN RIVERA, and STEVE DAHL Defendants.	)	Honorable Charles R.

OPINION AND ORDER

CHARLES R. NORGLE. SR., District Judge

Before the court is Defendants' motion for summary judgment. For the following reasons, the motion is granted.

I. BACKGROUND[1]

Valentina Perez ("Perez") filed suit against her former employer, Norwegian-American Hospital ("NAH"), and former co-workers, Ivan Rivera ("Rivera") and Steve Dahl ("Dahl"), based on events occurring between January and September of 2000. Specifically, Perez' complaint contains five counts: Count I, sexual discrimination under 42 U.S.C. § 1981{a); Count II, failure to promote under 42 U.S.C. § 2000e-2; Count m, retaliation under 42 U.S.C. § 2000e-3; Count IV, state law intentional battery; and Count V, state law intentional infliction of emotional distress. The distillate of Perez' federal claims, which are brought solely against

NAH, are that she had been discriminated against because of her gender, alleging a mosaic of incidents in support of those claims.

The Department of Public Security ("Security Department") at NAH is responsible for security at the hospital. The Security Department is organized in a para-militaristic hierarchy. Until June 15,2000, the highest position within the Security Department of NAH was the Director of Security. The Director of Security reported directly to the Chief Operating Officer of NAH, Mary Toma ("Toma"). At all times pertinent to this matter, James Byrnes ("Byrnes") held the position of Director of Security. Byrnes resigned in June of 2000, and thereafter NAH reorganized the structure of the Security Department. The position of Director of Security was eliminated and replaced with the position of Lieutenant. As implemented, the newly created position of Lieutenant reported directly to Toma, and was responsible for general oversight of the Security Department. The Lieutenant position was awarded to Rivera in July 2000.[2]

The remainder of this organizational hierarchy consisted of Sergeants, Corporals[3], and security officers. The

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[1] The court takes the facts from the parties' Local Rule 56.1 statements and accompanying briefs. Disputed facts are noted in the text.

[2] Rivera was hired by NAH as a security guard in June of 1989. In June of.1992, Rivera was promoted to Sergeant, and remained in that position until his promotion to Lieutenant. Rivera's formal evaluations indicate that he performed his duties well throughout this time.

[3]The position of Corporal was formerly referred to as Officer in Charge.

security officers were assigned to various posts during their shifts[4]. These security officers were immediately supervised by Corporals, who were the individuals on a shift that would assume responsibility in a Sergeant's absence. The Sergeants had general oversight and responsibility of the shifts to which they were assigned, and in addition, scheduled the work shifts of security officers, relieved security officers during break times, and were also responsible for checking the mechanical security systems in place at NAH.

In July of 1989, Perez was hired by NAH as a security officer in the Security Department In 1993, Perez was promoted to Officer in Charge.[5] Then in late 1994 or early 1995, Perez was promoted to the position of Sergeant. Perez' formal evaluations indicate that she. Performed her duties well throughout this time.

In 1997, Dahl, a DuPage County Sheriff Deputy, began working as a consultant to NAH, in response to gang-related crime problems at the hospital. Dahl's responsibilities included hiring additional off-duty Chicago Police Department officers to serve as armed security guards for NAH. Dahl and these armed security guards worked in the emergency room during the hours of 6:00 PM to 2:00 AM. These off-duty police officers operated under a separate chain of command from the unarmed security guards.

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[4]There were three shifts for security guards: the day shift from 6:30 A.M. to 2:30 P.M.; .the P.M. shift from 2:30 P.M. to 10:30 P.M.; and the night shift from 10:30 P.M. to 6:30 AM.

[5] The position of Officer in Charge is the equivalent of the position of Corporal. See footnote 3, supra.

The genesis of Perez' sexual discrimination claims can be traced to an incident that is alleged to have occurred on January 10,2000. On that date, Perez alleges that as she exited an elevator, Dahl hit her on the buttocks with a schedule book that he was carrying. Dahl was waiting to enter the elevator with Byrnes when this incident is alleged to have occurred. Perez indicated that she suffered pain as a result of the contact, but "self-treated it," and remained at work for the duration of her shift.

That very day, Perez complained to Byrnes of the incident. The following day, Perez also reported the incident to the Director of Human Resources, Russ Dickow ("Dickow"). In her response to defendants' Local Rule 56.1 statement, Perez states: "Ms. Perez denies that Norwegian conducted any meeting concerning her incident report at any time." (Pl.'s Resp. to Defs.' 56.1 statement ¶ 47.) However, in her deposition, Perez indicates that she did meet with Dickow and Byrnes, and further states that Byrnes indicated that he did not observe the alleged incident. (See P1.'s Dep. pg. 176-78) Thus, it is undisputed that on January 28, 2000, Perez, Byrnes and Dickow met to discuss the incident. At this meeting, Byrnes indicated that he did not see the alleged incident and that Dahl denied hitting Perez. Despite his denial, Dahl was talked to about the matter and told to act in a professional manner.

Perez states that after the alleged incident, Dahl never again came into physical contact with her, nor did any other employee of NAH. During her deposition, Perez was asked: "Aside from Steve Dahl, was there anyone at the hospital in all the time you worked there who did something hostile or offensive towards you?" Perez responded: "No." This admission seems to contradict the majority of Perez' claims. Yet Perez alleges that in May and June of 2000, her co-workers "shunned her and isolated her and perpetuated rumors that she would be demoted" after they learned of her

complaint against Dahl. In addition, Perez alleges that between July and September of 2000, Dahl would "watch her" and take notes. Sometime in mid-June of 2000, NAH posted a notice of a newly created Lieutenant position, in order to solicit applications. Perez alleges that notice of this position was never posted. However, evidence from other sources indicates that the position was posted. Subsequently, Perez did not apply for this position, and the position was awarded to the only applicant, Rivera in late June or early July of 2000.

On July 27,2000, Rivera called Perez to a meeting to discuss her performance and areas of concern. Rivera drafted a memo that detailed his areas of concern by listing numerous infractions which Perez allegedly committed. As a result of this meeting, Rivera determined that Perez would be transferred to the night shift. Rivera indicated that the reasons for the transfer were, because the shift that Perez supervised had the most problems, to allow Perez to improve her performance, and to balance the shifts. Perez alleges that the infractions, which Rivera documented, are false and that they were fabricated solely to discipline her for filing her internal complaint against Dahl. However, once again Perez admits that she committed a number of the infractions which were detailed in Rivera's memo.

Perez filed three separate claims of discrimination with the Equal Employment Opportunity Commission ("EEOC"). The first claim was filed on July 25, 2000, and contained the allegations of the January 10, 2000 incident, the rumors of her imminent demotion or termination, and the denial of an opportunity for a promotion. The second claim was filed on August 4, 2000, and contained allegations of being retaliated against for filing the first EEOC claim; specifically, that two days after she filed the initial EEOC claim she was transferred to another shift under the supervision of a lower ranking employee. However, it is

undisputed that NAH first learned of the EEOC charges on August 9,2000. The third claim was "filed on January 24,2001, and reiterated the allegations contained in the second claim, and alleged that she had being constructively discharged.

Plaintiff left work on September 19, 2000 and then went on sick leave. Plaintiff did not return to NAH afterwards, and tendered her resignation letter to Rivera and the Human Resources department on November 19, 2000.

Perez filed the present lawsuit on October 26, 2000. Perez bases her sexual discrimination claims on a mosaic of allegations. First, Perez contends that NAH fostered a hostile work environment, as evidenced by: 1) the January 10th incident where Dahl hit her on the buttocks, 2) NAH's failure to investigate the incident, 3) Dahl's actions in watching her and taking notes, and 4) the actions of her co-workers who "shunned her and isolated her and perpetuated rumors that she would be demoted" after they learned of her complaint against Dahl. Second, Perez contends that she was not promoted to the position of Lieutenant, while another male employee with equal or lesser qualifications was awarded the promotion. Third, Perez contends that after the alleged incident on January 10, NAH retaliated against her for reporting the complaint. She indicates that her co-workers ostracized her and perpetuated rumors about her demotion or termination, false allegations of policy violations were made against her, she was transferred to another shift, and this transfer was in effect a demotion because she was forced to report to a subordinate employee. In addition, Perez contends that while she and another male employees were ineligible for "comp time," she was denied "comp time," which was mistakenly given to another male employee.[6] In short, Perez claims that she was constructively discharged, since all of these actions led to a "work environment so uncomfortable that no person could reasonably be expected to endure it."

NAH filed a motion for summary judgment, which the court now addresses.

II. DISCUSSION

A. Standards for Summary Judgment:

Summary judgment is permissible when "there .is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c). "Factual disputes are 'material' only when they 'might affect the outcome of the suit under the go governing law:'" Oest v. Illinois Dept. of Corrections, 240 P.3d 605, 610 (7th Cir. 2001) (citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986)). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts. see Comfield v. Consolidated High School District No. 230, 991 F,2d 1316, 1320 (7th Cir. 1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. Murphy v. ITT Technical Services, Inc., 176 F.3d 934, 936 (7th Cir. 1999). Thus, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts."

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[6] Perez cites cases involving the Equal Pay Act, however, does not include such a count in her complaint. In short, Perez has filed to adequately develop this argument, both legally and factually. See United States v. Jones, 224 F.3d 621, 626 (7th Cir. 2000) (noting that an undeveloped argument speaks to its paucity, and refusing to consider the argument). In addition, Perez fails to link this incident into her sexual discrimination arguments based on hostile work environment, failure to promote, and retaliation.

Matsushita Elec. Indus. Co.. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "The days are gone, if they ever existed, when the nonmoving party could sit back and simply poke holes in the moving party's summary judgment motion." Fitzpatrick. Catholic Bishop of Chicago, 916 F.2d 1254, 1256 (7th Cir. 1990). Further, in deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. See Bombard v. Fort Wayne Newspapers Inc., 92 F.3d 560, 562 (7th Cir.1996).

The court views the record and all reasonable inferences drawn there from in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(c); see also Perdomo v. Browner, 67 F .3d 140, 144 (7th Cir. 1995). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); See also Wolf v. Buss (America) Inc., 77 F.3d 914, 922 (7th Cir. 1996). The choice between reasonable inferences from facts is a jury function. See Anderson, 477 U.S. at 255.

B. Sexual Discrimination Claims:

1. Hostile Work Environment:

Initially, it must be noted that Count I of Perez' complaint alleges sexual discrimination in violation of 42 U.S.C. § 1981(a). While, a claim under § 1981 includes the same elements and employs the same analysis and methods of proof as a Title VII claim, see Johnson v. City of Fort Wayne, 91 F.3d 922, 940 (7th Cir. 1996), a claim for sexual discrimination is not cognizable under § 1981. See Friedel v. City of Madison, 832 F.2d 965, 967 fn. 1 (7th Cir. 1987). In Friedel, the Seventh Circuit stated:

> "It is important to note here, . . . that while section 1983 and Title VII reach both sex and race discrimination, claims of sex discrimination are not cognizable under section 1981, e.g., Runyon v. McCrary, 427 U.S. 160, 167, 96 S.Ct. 2586, 2592, 49 L.Ed.2d 415 (1976); St. Louis v. Alverno College, 744 F.2d 1314, 1317 (7th Cir.1984), and we have so construed plaintiffs' amended complaint. We urge counsel, however, to be more mindful of the distinctions among sections 1981 and 1983 and Title VII; drafting complaints is the business of the bar, not the bench."

Id. With this admonition, this court follows the advice of Friedel, and construes Perez' complaint of sexual discrimination under Title VII, and addresses the motion for summary judgment.

Count I of Perez' complaint alleges that a hostile work environment was created by: 1) the hit on the buttocks by Dahl, 2) NAH's failure to investigate the incident. 3) Dahl's actions in watching her and taking notes, and 4) actions of her co-workers who "shunned her and isolated her and perpetuated rumors that she would be demoted" after they learned of her complaint against Dahl. "To maintain an actionable claim under this theory, an employee must demonstrate that her co-worker or supervisor harassed her *because* of her sex." Hilt-Dyson v. City of Chicago, 282 F.3d 456, 462 (7th Cir. 2002) (citing Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 81 (1998)) (emphasis added). Furthermore, the "harassment must be 'so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment'" Id. (citing Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998)).

"[A] hostile work environment one that is 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" Id. at 463 (citing Faragher, 524 U.S. at 787; Hostetler v. Quality Dining, Inc., 218 F.3d 798, 807 (7th Cir. 2000)). "In determining whether contested conduct actually creates an objectively hostile work environment, a number of factors may be considered including 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. (citing Faragher, 524 U.S. at 787-88, 118 S.Ct. 2275; Hostetler, 218 F.3d at 806). "Title VII does not prohibit all verbal or physical harassment in the workplace." Id. The Seventh Circuit as stated: "Although a bright line does not exist separating innocuous from actionable behavior, this court has noted that isolated and minor incidents of questionable conduct generally will not warrant a conclusion of sexual harassment." Id. (citing Koelsch v. Beltone Elecs. Corp., 46 F.3d 705, 708 (7th Cir. 1995).

The court now addresses whether Perez' claim of a hostile work environment can survive a motion for summary judgment Perez alleges that Dahl hit her on the buttocks with a schedule book, and the Court accepts that allegation as true for the purpose of this motion.

There can be no doubt that Perez found the incident to be offensive; however, that incident must also be objectively offensive in order to warrant of finding of sexual harassment. Objectively viewed, this one contact, which Perez admitted never occurred again, cannot support a hostile work environment claim.

In Hilt-Dyson, a female police officer alleged that on two occasions her supervisor rubbed her back, each lasting

less than one minute, and in addition singled her out during a uniform inspection and stated at her chest. See Hilt-Dyson, 282 F.3d at 463-04. The Seventh Circuit held that these incidents did not equal an objectively hostile work environment, and were not severe and pervasive. See id.

Viewed along a continuum of sexual harassment, Perez' allegations fall well short of the allegations that were found to be insufficient in Hilt-Dvson. In terms of the severity of the incident, Perez does not describe the incident as having been forceful, nor as having lasting for any longer than a fleeting second of time. In terms of the incident interfering with her work performance, Perez did not seek to be relieved from her shift, but rather self-treated the injury and remained at work. The schedule book touched the winter uniform covering the buttocks of Perez who was exiting a public elevator. The details of Perez' self-treatment are left to speculation. There were no shouts, screams, calls for assistance, or reactions by the veteran security officer at the time of the contact. Furthermore, Perez has failed to show that the contact on the buttocks was of a sexual nature. See Hilt-Dvson, 282 F.3d at 462 ("an employee must demonstrate that her co-worker or supervisor harassed her *because* of her sex"). Perez does not assert that Dahl made any comments during this incident or acted in a sexually explicit manner. This incident, while certainly unprofessional, if it did in fact occur, may have been no more than an expression of camaraderie amongst the corps of security guards, not unlike that observed on national television between athletes, with no intended or perceived sexual connotation. In short, this isolated and minor incident of questionable conduct will not support a hostile work environment claim.

Perez attempts to bolster her hostile work environment claim by the mosaic of alleged incidents which occurred after the January 10, 2000 incident. Perez chums that her complaint was not investigated, Dahl watched her

and took notes, and her co-workers "shunned her and isolated her and perpetuated rumors that she would be demoted." However, none of these establish that Perez faced a hostile work environment

First of all, the actions and rumors from Perez' co-workers are not the type of incidents which create an objectively hostile work environment "Freedom from 'public humiliation' is not a term condition or privilege of employment" See Spring v, Sheboygan Area. Sch. Dist.. 865 F2d 883, 886 (7th Cir. 1989). Secondly, Perez has not shown that NAB failed to investigate her complaint, because of her gender. While Perez claims that NAH did not investigate this incident, her deposition testimony contradicts her claim. In fact, her complaint was investigated, and Byrnes and Dickow met with her on January 28, 2000 to discuss the matter; a. meeting which Perez has admitted attending. During this meeting, Perez was told by Byrnes that he did not witness the alleged hitting. Furthermore, Dahl was spoken to and he denied Perez' allegations. Dickow testified that at the end of this meeting Perez stuck to her version of the incident, but thanked him for conducting an investigation. Thirdly, Perez fails to link the allegations that Dahl watched her and took notes to any type of sexual harassment. For example, she does not state that Dahl leered at her. Compare Hilt-Dyson, 282 F.3d at 464 (employee alleged that supervisor stared at her chest). Perez also fails to indicate how many times this behavior is alleged to have occurred. In short, a security guard watching their surroundings fails to evidence a hostile work environment. Lastly, and most damning is that in her deposition, when asked: "Aside from Steve Dahl, was there anyone at the hospital in all the time you worked there who did something hostile and offensive towards you?" Perez indicated: "No." Perez' admission that no one at the hospital did anything hostile and offensive towards her seems to contradict the majority of her claims. It is clear that after the January 28, 2000 meeting that NAH conducted there was

never any form of physical contact between Perez and Dahl or any other NAH employees. The meeting was a reasonable response and presumably effective. In conclusion, Perez has failed to establish her hostile work environment claim.

2. Failure to Promote:

Count II of Perez' complaint alleges that she was not promoted to the position of Lieutenant, while another male employee with equal or lesser qualifications was awarded the promotion, in violation of 42 U.S.C. § 2000 e-2.

Title VII provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2.

A plaintiff claiming some form of actionable discrimination under Title VII can overcome an employer's motion for summary judgment in one of two manners. "The first is by putting in enough evidence (whether direct or circumstantial) to raise a genuine issue concerning the employer's motivation in carrying out the challenged employment action." Brill v, Lante Corp., 119 F.3d 1266, 1269 (7th Cir. 1997). This direct method is rarely utilized, and is best exemplified by a plaintiff offering "smoking gun" types of evidence, such as admissions or strong circumstantial evidence. See Wallace v. SMC Pneumatics. Inc., 103 F 3d 1394, 1397 (7th Cir. 1997). "The second is the so-called McDonnell-Douglas method, the frequently used burden-shifting framework first setout in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)." Brill, 119 F.3d at 1270.

Under the McDonnell-Douglas method, in order to make a *prima facie* showing of discrimination in a failure to promote case, Perez must demonstrate that (1) she was a member of a protected group; (2) she applied for and was qualified for the position sought; (3) she was rejected for the position; and (4) those who were promoted had similar or lesser qualifications for the job. See Ghosh v. Indiana Dept. of Environmental Management, 192 F.3d 1087, 1091 (7th Cir, 1999). If Perez succeeds in establishing a *prima facie* case of discrimination he burden then shifts to NAH who must explain why it failed to promote Perez, based on nondiscriminatory reasons. Id. If NAH proffers a nondiscriminatory reason, the burden then shifts back to Perez, who then must demonstrate that NAH' s proffered reasons are pretextual. Id. "Pretext is established if the plaintiff can show that the defendant's proffered reasons are either lies or completely lacking in factual basis," Id. (citing Mills v. Health Care Serv. Corp., 171 F.3d 450, 458 (7th Cir, 1999)).

The Court now addresses whether Perez' claim of failure to promote can survive a motion for summary judgment. Since Perez has offered no direct evidence of discrimination, her claim must be analyzed under the McDonnell-Douglas burden-shifting framework.. Perez cannot establish a *prima facie* case of discriminatory failure to promote. Perez, a female, certainly is a member of a protected group under Title VII. However, Perez has failed to establish that she applied for the; Lieutenant position. Yet this point is the essence of Perez' failure to promote claim - that she was denied the opportunity to apply for the position because it
was never posted. The burden-shifting framework is to be applied flexibly, and so the court will further address this element. See Flores v. Preferred Technical Group. 182 F.3d 512, 515 (7th Cir. 1999) (noting that courts must apply the McDonnell-.Douglas test flexibly; for example, when an

employee concedes that she was not meeting her employer's expectations but claims that she was treated more harshly than other rule-breakers, it makes "little sense in this context to discuss whether she was meeting her employer's reasonable expectations").

Perez alleges that May and June of 2000 she spoke to Byrnes inquiring about the availability of a prospective Lieutenant position, which Byrnes was in the process of creating. After these conversations, Byrnes took no further action in regard to creating the Lieutenant position and resigned his employment with NAH effective June 15, 2000. NAH then reorganized the organizational hierarchy of the Security Department, and changed the duties of the prospective Lieutenant position. The decision regarding the duties of this newly created Lieutenant position was made by Dickow, Toma and the President of NAH, Michael O'Grady. This newly created position was to replace the Director of Security position, and be responsible for general oversight of the Security Department. The Lieutenant position was awarded to Rivera, the only employee to apply for the position, in late June or early July of 2000.

Perez contends that she was not given the opportunity to apply for this position, since it was never made known to her or other employees. In response, NAH contends that it posted this position in the employee cafeteria and the Human Resources office so that employees could view the information and submit applications. NAH's version of events is corroborated by another employee of the Security Department, Princess Johnson (" Johnson"), who testified that the position was posted in the Human Resources office. In addition, Johnson testified that Perez stated that she was not interested in the position. Thus, the evidence indicates that Perez' failure to apply for the position can be attributed only to her, and not to NAH. Therefore, Perez has failed to satisfy the second element of her *prima facie* case.

More significantly, Perez fails to establish that Rivera had similar or lesser qualifications for the position than she did. Rivera had held the position of Sergeant with NAH for a full two years longer than Perez. Perez attempts to bolster her claim by indicating that she had achieved additional training and certification in security-related areas, which Rivera lacked. Perez also indicated that the performance reviews of her and Rivera were essentially identical. However, the fact remains that Rivera had more years of experience in positions of supervision and leadership, both at NAH and another hospital, and the Lieutenant position was essentially a supervisory and leadership position. Therefore, Perez has also failed to satisfy the fourth element of her *prima facie* case.

3.Retaliation:

Count III of Perez' complaint alleges that she was retaliated against for reporting Dahl's conduct by receiving false allegations of policy violations and being transferred to another shift under the supervision of a subordinate employee, in effect a demotion.

Title VII prohibits an employer from retaliating against an employee who has "opposed any practice made an unlawful employment practice by this subchapter or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the statute. See 42 U.S.C. § 2000e-3(a). As with other Title VII claims, a plaintiff seeking to prove such a violation may present either direct or indirect evidence of the employer's intent. See Hilt-Dyson, 282 F.3d at 465. Perez seeks to establish her claim by the indirect burden-shifting method.

Under the indirect methodology, Perez must first present evidence sufficient to establish a *prima facie* case that

NAH retaliated against her in violation of Title VII Id. In this case, a *prima facie* case is established if Perez can demonstrate that: (1) she engaged in statutorily protected activity; 2) she performed her job according to NAH's legitimate expectations; (3) despite meeting NAH's legitimate expectations; she suffered a materially adverse employment action; and (4) she was treated Jess favorably than similarly situated employees who did not engage in statutorily protected activity. Id. see also Stone v. City of Indianapolis Pub. Util. Div., 281 F.3d 640, 644 (7th Cir. 2002). If Perez fails to establish any element of the prima facie case, her retaliation claim fails and cannot survive summary judgment Id.. If, on the other hand, Perez establishes a *prima facie* case, a presumption of discrimination has been established; the burden of production then shifts to NAH, who must offer a nondiscriminatory reason for the adverse employment action. Id. Should NAH offer a nondiscriminatory reason for the adverse employment action, the presumption of discrimination has been rebutted; the burden of production then shifts back to Perez to demonstrate the pretextual mixture of the proffered reason. Id. "At this point, if the employee fails to establish
pretext, her retaliation claim cannot survive summary judgment." Id.

Perez' retaliation claim may be easily disposed of based solely on the lack of temporal proximity between the reporting of the alleged sexual harassment and the alleged retaliation. Perez reported Dahl's conduct to Byrnes and Dickow in January of 2000. The false allegations of policy violations and transfer to another shift under the supervision of a subordinate employee, which she contends are retaliatory acts, occurred in late July of 2000. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very

close." Clark County Sch. Dist. v. Breeden. 532 U.S. 268, 273 (2001) (citing Hughes v. Derwinski. 967 F.2d 1168,1174-75 (7th Cir.1992) (4-monthperiod insufficient)) Thus, the six-month gap between the protected activity and the allegedly adverse employment actions militate against a finding of retaliation.

Additionally, Perez' retaliation claim fails because she cannot establish a *prima facie* case of retaliation. Perez cannot establish the second element of her *prima facie* case, that she performed her job according to NAH's legitimate expectations. What Perez argues are false allegations of policy violations stem from a meeting she had with Rivera on July 27, 2000. On that date, Rivera and Perez discussed a number of concerns that he bad with her performance. Rivera documented these concerns in a memo, which the two reviewed. Specifically, this memo set forth a list of instances of Perez' poor performance including: "excessive tardiness; leaving her shift before time; threatening some night shift officers to go to court for a certain incident; not responding to the pager when called upon during an emergency; no discipline for attendance and punctuality; no Accutech system check done in PM shift; no frequent check on 1121 and 1029 building alarm system; poor scheduling of man power; scheduled herself off during Puerto Rican parade no supervision in charge; driving the Jeep with head lights off during the night; no daily activity sheets for ex-employee Jiminez; visitor passes left in lobby area unattended after 2130 hours; not refueling Jeep at end of day; not being familiar with the location when fire alarm system activates; supervisor keys not given to next shift at end of day, resulted in lost keys; no home number given in case of emergency." Rivera testified that he bad these concerns based on his observations of Perez while he was a Sergeant.

However, as with other contradictions in her allegations, what Perez argues are false

allegations of policy violations are in reality undisputed facts. In her deposition, Perez testified that she had left work before the end of her shift; she did not respond to a pager during an emergency; she drove the security Jeep from one parking lot to another without the head lights on while it was dark; and that she did not refuel the Jeep at the end of the day if she was busy. In addition, as to Rivera's allegation of excessive tardiness, when asked whether Perez was late for work, Johnson testified: "She would be late a lot of times." Furthermore in regard to the remainder of Rivera's allegations, Perez simply denies them in a conclusory manner and fails to offer any proof to support those denials. Therefore, Perez cannot establish the second element of her *prima facie* case, that she performed her job according to NAH's legitimate expectations because Perez admits that she committed a number, but not all sixteen, of the infractions listed in Rivera's memo.

In addition, Perez cannot establish the third element of her *prima facie* case, that she suffered a materially adverse employment action. A materially adverse employment action is "more than a mere inconvenience or an alteration of job responsibilities." Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). The Seventh Circuit has indicated:

> "Although creating a precise list of activities that constitute adverse employment actions would be impossible because of the unique circumstances of individual cases, we have indicated that materially adverse actions may include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits significantly diminished material responsibilities; or other indices that might be unique to a particular situation.'"

Hilt-Dyson, 282 F.3d at 466 (citing Ribando v. United Airlines. Inc., 200 F.3d 507, 510 (7th Cir. 1999)).

Perez attempts to establish an adverse employment action by arguing that she received false allegations of policy violations and was transferred to another shift under the supervision of a subordinate employee, which was in effect a demotion. As just indicated, the allegation that she received false allegations of policy violations is unsubstantiated. However, Rivera's memo does not evidence an adverse employment action. "Standing alone, a letter of concern or counseling... does not rise to the level of an adverse employment action." Ribando, 200 F.3d at 511.

As a result of this meeting at which these problems were discussed, Rivera determined that Perez would be transferred to the night shift. Perez retained her title as Sergeant and performed substantially the same duties as she had performed on her previous shift. In addition, Perez did not receive a reduction in salary. Yet, Perez argues that Rivera transferred her because he knew that it would adversely affect her, due to family obligations.

Whether a change in employee's working conditions has been materially adverse is a question of fact, which may be resolved on summary judgment only if the question is not fairly contestable. See Williams v. Bristol-Myers Squib Co., 85 F.3d 270, 273 (7th Cir. 1996). "Obviously a purely lateral transfer, that is, a transfer that does not involve a demotion in form or, substance, cannot rise to the level of a materially adverse employment action." Id. at 274. "A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." Id.

In Williams, an employee was transferred to another sales territory and placed in a coaching program in order to

survey the employee's performance. Id. at 272. The Seventh Circuit held that this transfer and placement in a coaching program did not rise to level of materially adverse employment action. Id.

In the present case, Perez' transfer is virtually indistinguishable from the "coaching program" the employee was transferred to in Williams. Rivera decided to transfer Perez to the night shift because the shift that Perez had supervised, the P.M. shift, had the most problems. Rivera also transferred Perez so that she could improve her performance. Perez characterizes the night shift as a demotion, because she was under the supervision of another Sergeant, Facundo Allere ("Allere") and a Corporal, Frank Gonzalez ("Gonzalez"). However, Perez was not under the supervision of Sergeant Allere or Corporal Gonzalez in hierarchical sense; rather, she worked closely with the officers on the night shift so that she could become acclimated to the procedures of that shift. During this time, Perez retained her title as Sergeant and performed substantially the same duties as she had performed on her previous shift. Furthermore, once this acclimation occurred, Perez was the only Sergeant in the night shift; however, she resigned shortly thereafter. Thus it cannot be argued that Perez suffered "significantly diminished material responsibilities." Hilt-Dyson, 282 F.3d at 466 (citing Ribando, 200 F.3d at 510).

Perez also attempts to establish an adverse employment action by arguing that she was constructively discharged. Perez seeks to establish this claim by repeating the incidents of which She complains in a blunderbuss fashion, arguing that the totality of the circumstances establish that she was constructively discharged. In order to establish a constructive discharge claim, a plaintiff must show that their working conditions were so intolerable as to force resignation involuntarily. See Harriston v. Chicago

Tribune Co., 992 F.2d 697, 705 (7th Cir. 1993). Absent extraordinary circumstances, a complaining employee is expected to remain on the job while seeking redress. Perry v. Harris Chernin. Inc., 126 F.3d 1010,1015 (7th Cir. 1997).

As indicated earlier, none of these alleged incidents, individually or collectively, establish an adverse employment action. Perez resigned her employment with NAH voluntarily. While Perez may have subjectively believed that these incidents were so severe that she bad no option other than to resign, the fact remains that these subjective beliefs amount to no more than speculation. "Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." Tyler v. Runyon. 70 F.3d 458, 469 (7th Cir. 1995).

4. Pendent Claims:

Having concluded that Perez' federal claims cannot survive a motion for summary judgment, the court declines to exercise supplemental jurisdiction over her state law intentional battery and intentional infliction of emotional distress claims. See 28 U.S.C. §1367(c); see also Van Harken v. City of Chicago, 103 F.3d 1346,1354 (7th Cir.1997) (The general rule is that when as here the federal claim drops out before trial . . . the federal district court should relinquish jurisdiction over the supplemental claim.").

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted as to Counts I-III, and the court declines to exercise supplemental jurisdiction over Counts IV - V.

IT IS SO ORDERED.

ENTER: /s/ Charles R. Norgle
CHARLES R. NORGLE,
SR. Judge United States
District Court

DATED: February 4, 2003